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In the Supreme Court of the United States

OCTOBER TERM, 1983

HARRY & BRYANT CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION**

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QUESTION PRESENTED

Whether, in order to review the Federal Trade Commission's Trade Regulation Rule for Funeral Industry Practices, the court of appeals was required to have physical possession of the 70,000-page rulemaking record that was being retained and held for it at the Commission.



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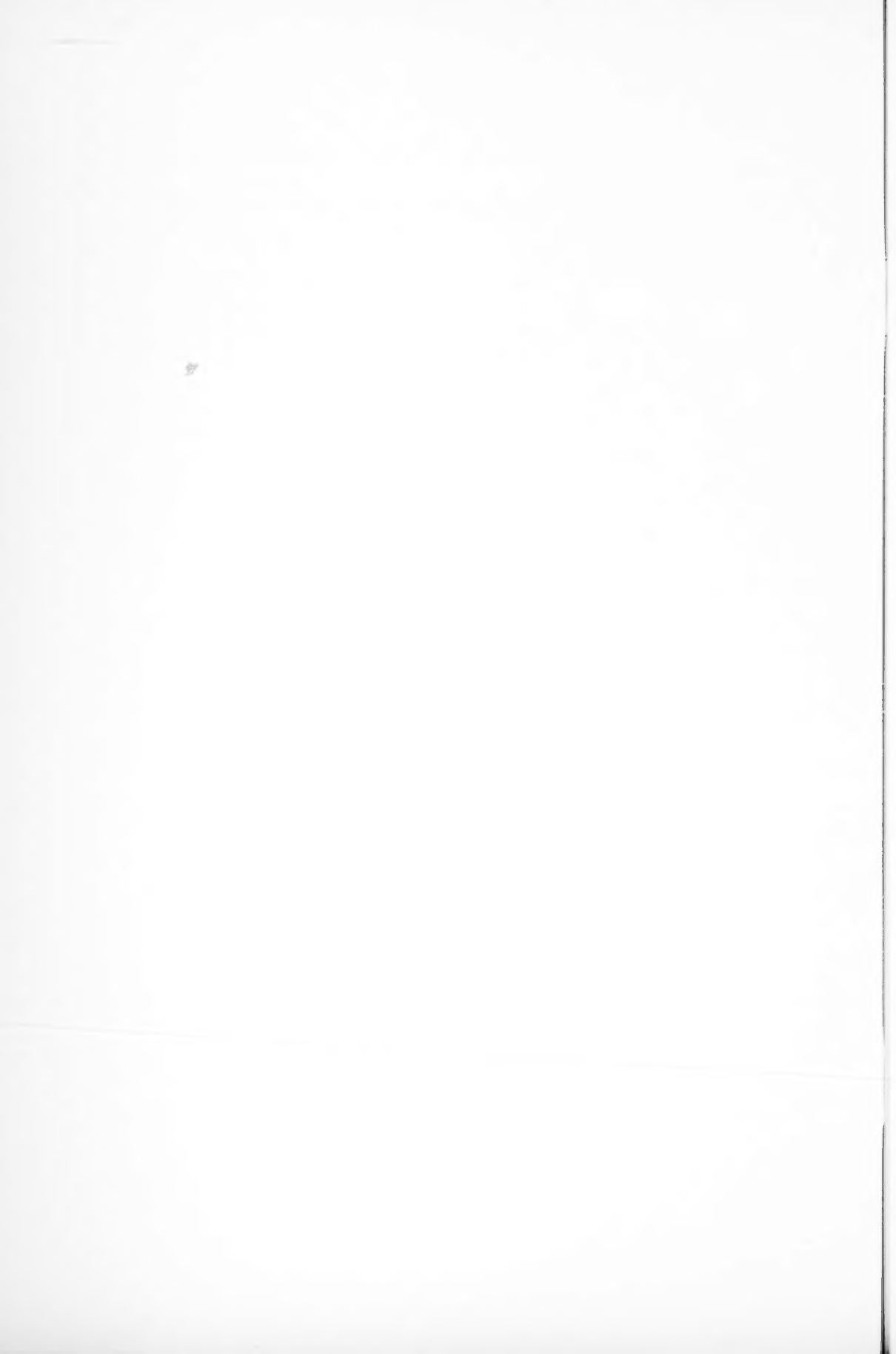
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No. 83-1762

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 726 F.2d 993. The Federal Trade Commission's Statement of Basis and Purpose accompanying its Trade Regulation Rule for Funeral Industry Practices is published at 47 Fed. Reg. 42260-42299 (1982).¹

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1984. A petition for rehearing was denied on March 1, 1984 (Pet. App. 19a-22a). The petition for a writ of certiorari was filed on April 30, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

¹Instead of printing the Statement of Basis and Purpose in their appendix (Sup. Ct. R. 21(k)(iii)), petitioners have lodged ten copies with the Clerk of the Court (Pet. 2 n.1).

STATUTE AND RULES INVOLVED

Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, is set forth at Pet. App. 39a-52a. Fed. R. App. P. 17(b) is set forth at Pet. 3 n.3. The Commission's Trade Regulation Rule for Funeral Industry Practices, 16 C.F.R. Pt. 453, is set forth at Pet. App. 23a-38a.

STATEMENT

Pursuant to Section 18 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 57a, the Federal Trade Commission promulgated a Trade Regulation Rule for Funeral Industry Practices. Section 18(a)(1) (15 U.S.C. 57a(a)(1)) authorizes the Commission to prescribe rules that (1) "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce within the meaning of section [5(a)(1)]" of the Act, 15 U.S.C. 45(a)(1), and (2) contain "requirements * * * for the purposes of preventing such acts or practices." Section 18 provides for a form of hybrid rulemaking that combines the informal rulemaking procedures of 5 U.S.C. 553 with oral hearings at which participants may cross-examine witnesses on disputed issues of material fact. 15 U.S.C. 57a(b)(1) and (c)(2). After a rule is promulgated, interested parties may petition a court of appeals for review under the standards of both the Administrative Procedure Act (5 U.S.C. 706(2)(A), (B), (C), and (D)) and Section 18(e) of the FTC Act, 15 U.S.C. 57a(e). The latter statute empowers the reviewing court to determine whether the rule is "supported by substantial evidence in the rulemaking record * * * taken as a whole." 15 U.S.C. 57a(e)(1) and (3).²

²Section 18(e)(5)(C) of the FTC Act, 15 U.S.C. 57a(e)(5)(C), specifies that 5 U.S.C. 706(2)(E) (review for substantial evidence) "shall not apply" to substantive rules promulgated under Section 18.

1. The Funeral Rule defines several unfair or deceptive practices in the sale of funeral goods and services and prescribes preventive requirements. After a rulemaking proceeding that produced a record in excess of 70,000 pages, the Commission concluded that certain practices engaged in by funeral providers were unfair or deceptive. See Pet. App. 23a-37a; 47 Fed. Reg. 42260, 42265-42271 (1982). To redress these practices the Rule requires that funeral providers: (1) give consumers a written list containing prices of funeral goods and services on an itemized basis before funeral arrangements are made (although providers are also free to quote package prices); (2) offer price information to consumers who telephone and ask about the terms, conditions, or prices for funeral services or goods; (3) obtain express permission from a family member or representative before embalming is performed, except under special circumstances; (4) refrain from requiring use of a casket for direct cremation; (5) refrain from specified misrepresentations; and (6) include several short disclosures on the price list to inform consumers of their legal rights and purchase options (Pet. App. 25a-37a).

2. The Commission first published notice of a proposal to adopt a funeral rule in August 1975 (see 47 Fed. Reg. at 42261). In response, it received some 9,000 comments and documents, covering approximately 20,000 pages. In 1976 an officer of the Commission presided over 52 days of hearings in six cities, at which 315 witnesses testified in support of or opposition to the proposed rule. Participants had ample opportunities to cross-examine witnesses and to submit documents to rebut materials that were placed in evidence at the hearings. See Pet. App. 5a-6a, 8a-9a; 47 Fed. Reg. at 42262, 42265 nn. 57-58, 42267 nn. 76-78; C.A. App. 280-410, 1145. These hearings generated an additional 14,700 pages of transcript and approximately 4,000 pages of exhibits (Pet. App. 6a).

In separate and extensive reports issued in 1977 and 1978, the presiding officer and Commission staff, respectively, recommended that the Commission adopt a rule regulating deceptive and unfair funeral industry practices (C.A. App. 935-1091, 1104-1663). In the ensuing comment period the Commission received more than 1300 additional written comments. After directly hearing oral presentations from several participants, the Commission unanimously voted to issue a funeral rule in March 1979. See Pet. App. 6a; 47 Fed. Reg. at 42262. The Commission, however, was subsequently required by Section 19 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 391-393, to reconsider, revise and republish the proposed rule, and to receive additional oral and written comments. In July 1981 the Commission again unanimously voted to issue the rule. See 47 Fed. Reg. at 42262-42263. It was not officially promulgated until September 24, 1982, after review by the Office of Management and Budget under 44 U.S.C. 3501 (see 47 Fed. Reg. at 42263). The accompanying Statement of Basis and Purpose contained an extensive and detailed discussion of evidence supporting the Rule and also directly addressed the arguments offered against the Rule (47 Fed. Reg. at 42263-42299; C.A. App. 5-41).

3. Petitions for appellate review of the Funeral Rule under Section 18(e) of the FTC Act, 15 U.S.C. 57a(e), were consolidated in the United States Court of Appeals for the Fourth Circuit. The Commission filed in that court a certified index of the record, and, as provided in 28 U.S.C. 2112(a) and Fed. R. App. P. 17(b), retained and held the record itself for transmission when and as required by the court. The index alone covered some 400 pages.³ Petitioners

³Briefing of the petitions was deferred while Congress reviewed the Funeral Rule under a legislative veto provision added to the FTC Act by Section 21 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, which was later held unconstitutional in *Consumers Union, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, No. 82-935 (July 6, 1983).

subsequently filed a joint appendix, which had been deferred pending the parties' initial exchange of briefs. The appendix contained 1900 pages and included 45 additional documents designated by petitioners to supplement their initial designations.

On September 8, 1983, one week after petitioners had filed their reply brief and the court of appeals had scheduled oral argument, petitioners requested that the Commission transmit to the court of appeals every document in the rulemaking record. They stated: "Because the petitions raise numerous questions concerning the adequacy of the record and the sufficiency of the evidence * * *, petitioners believe that the complete record should be before the Court" (Pet. App. 53a). The Commission replied that it "recognizes petitioners' right to request transfer of any or all parts of the record under Rule 17(b)," but "advise[d] the Court of the size of the record in the event the Court wishes to direct alternative treatment" (Pet. App. 55a). The total rulemaking record contained approximately 70,000 pages, which occupied 151 docket binders, spanned 50 feet of shelf space, and weighed approximately one-half ton (*id.* at 55a).⁴ The Commission offered to ship the record to the court in two weeks unless the court directed otherwise (*id.* at 56a).

⁴The record consists of two parts: (1) materials that formed the basis for the Rule, including documents submitted by Commission staff, and testimony, documents, and comments that were received during official comment periods; and (2) a separate "public record" category, consisting of materials and comments submitted to the Commission outside the comment periods, which were made available to the public but were not generally part of the basis for the Rule. See 16 C.F.R. 1.18(c); C.A. App. 929, 1136 n.53, 1146-1147. Petitioners' request for transmission of the record did not distinguish between these two categories.

Noting that under Fed. R. App. P. 17(b) the agency-retained portions of the record were still "a part of the record on review for all purposes," the court, through its clerk, advised the Commission to continue holding the record. Petitioners were authorized to renew their request after oral argument, at which time the court would decide "during the decisional and opinion drafting process, what part of the record, if any, it needs." Pet. App. 57a-58a. Petitioners renewed their request shortly after oral argument, but did not designate particular portions of the record they wished the court to examine (*id.* at 61a). The court did not request the Commission to supply additional portions of the record.

On January 12, 1984, the court of appeals issued a unanimous opinion rejecting all of petitioners' arguments and affirming the Funeral Rule in all respects (Pet. App. 1a-18a). Its opinion stated that the court had conducted "a careful review of the whole record" (*id.* at 18a), and the court's discussion of the substantial evidence supporting the rule expressly referred to surveys, comments, testimony, admissions by members of the funeral industry, and Commission findings in the record (*id.* at 13a-16a).

On petitions for rehearing, one of several issues raised by petitioners was the court's failure to require physical transmission of the entire record. Petitioners did not allege that they had been substantively prejudiced, nor did they point to specific portions of the record that the court of appeals should have examined. See 82-1850 Petition for Rehearing 7-9. Rehearing was denied without opinion.

ARGUMENT

The only question presented for review concerns the court of appeals' alleged failure to examine the rulemaking record "taken as a whole" because it did not have all 70,000 pages of the record physically at hand. Section 2112(a) of

the Judicial Code (28 U.S.C.) expressly authorizes rules providing that an agency may file a certified list in lieu of the actual record, and may "retain and hold [the record] for the court" and transmit it in whole or in part "when and as required by [the court]."⁵ Fed. R. App. P. 17(b) implements this provision and makes the parts of the record retained by the agency "a part of the record on review for all purposes." Thus the entire record retained and held by the Commission was available to and in the constructive possession of the court below, even though it was not physically transmitted to the clerk's office. Moreover, petitioners do not contend that the court of appeals failed to consider specific arguments or evidence because it did not have physical possession of the record.⁶ Accordingly, the court did not depart from the accepted course of judicial review. No question of general public importance is presented by the petition, and it should be denied.

⁵The relevant portion of 28 U.S.C. 2112(a) provides:

Such rules may authorize the agency * * * to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court.

⁶The court of appeals held that the Commission's Funeral Rule satisfied the standards for judicial review set forth in Section 18(e) of the FTC Act. Petitioners do not directly ask this Court to review the finding that the Rule was supported by "substantial evidence." They apparently have limited their petition in light of the "familiar rule" that this Court " 'will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981) (brackets in original) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

Petitioners' contention (Pet. 10) that they had an absolute right under Fed. R. App. 17(b) to have the entire record physically transferred to the court of appeals is insubstantial. The Commission fulfilled its obligation by promptly offering to ship all 70,000 pages to the court. But whether the court needed to have physical possession of the entire record was, under 28 U.S.C. 2112(a) and Rule 17(b), a matter for the court to determine in its discretion as dictated by the needs of judicial review. Storing a record of this size would have imposed a substantial burden on the court. Petitioners never attempted to justify this burden by specifying any additional portions of the record not included in the joint appendix that they believed the court should examine. Nor have petitioners attempted to explain how possession of the entire record would have affected the court's decision. Section 2112 was intended to prevent precisely such unnecessary and burdensome impositions on courts, agencies and parties.⁷

Petitioners also contend (Pet. 9) that the court of appeals must have failed to review the rulemaking record "taken as a whole," as required by Section 18(e) of the FTC Act, because it did not have the entire record physically available in the clerk's office. Petitioners confuse the standard of review with the process for conducting that review.

Review on the "whole record" requires a court to consider both the evidence supporting an agency's finding and also any contradictory evidence that "fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-488 (1951). Professor Davis has articulated this summary of the "whole record" requirement:

⁷The legislative history of 28 U.S.C. 2112 shows Congress's expectation that parties would request transmission of the entire record only where it was genuinely necessary for judicial review. S. Rep. 2129, 85th Cong., 2d Sess. 2, 4 (1958).

The reviewing court must take into account whatever detracts from evidence it holds to be substantial, *but this is not the same as saying that every page must be read*. One party normally points out the evidence supporting the finding and the other normally points out the evidence detracting from the finding; by relying on the parties' sifting the judges may often review quite conscientiously without reading the entire record.

4 Davis, *Administrative Law Treatise* § 29.03, at 130 (1958) (emphasis added).⁸

This is precisely the process followed here, and the court below thus complied with the requirements for review of the record "taken as a whole." Under 28 U.S.C. 2112(a) and Fed. R. App. P. 17(b), the court had constructive possession of the whole record. It also had before it a 400-page certified index and 1900 pages from the record that the parties had designated for the joint appendix after they had narrowed the issues by exchange of briefs, including 165 pages of briefs on petitioners' side. Moreover, the court expressly stated that it had undertaken "a careful review of the whole record" (Pet. App. 18a), and its opinion took note of the parties' arguments and of the evidence in the record that had been cited to it. The court was not required to go

⁸Professor Davis supported his conclusion by quoting Justice Black's response at oral argument to a suggestion that review on the "whole record" requires judges to read the entire record. See 4 Davis, *supra*, at 130-131 n.17. See also *Sierra Club v. Costle*, 657 F.2d 298, 410 n.540 (D.C. Cir. 1981), quoting Rodgers, *Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision*, 11 *Env'tl. L.* 301 (1981): "'Few practitioners believe that judges read, much less studiously follow, the monstrous records thrust before them.'"

beyond this and read every document in the record. Accordingly, it would be pointless to require that the court nonetheless take physical possession of the entire record.⁹

Petitioners had the responsibility of pointing out to the court of appeals what additional evidence, if any, the court should have examined. They did not do so. Thus the court below did not depart from the norms of judicial review by declining to accept petitioners' request that it undertake its own search through this enormous record for possibly contradictory evidence. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 379-380 (D.C. Cir. 1981) ("[I]t is not reasonable * * * to expect the court on its own to gather together all of the scattered pieces of information that are necessary to make a coherent whole".)

⁹There is no basis to petitioners' assertion (Pet. 10) that the court "never * * * reviewed or consulted the record." To the contrary, their claims that the Fourth Circuit "ignored" that record (Pet. 8, 10, 13) are merely reiterations of their position that the court was obliged to take physical possession of, and examine, every document in the Commission's rulemaking record.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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